

Supreme Court, U. S.
FILED
SEP 13 1977
MICHAEL RORER, JR., CLERK

OCTOBER TERM, 1977

No.

V.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEVEN B. DUKE
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In The
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1977

VINCENT PACELLI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Vincent Pacelli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 27, 1977.

OPINION BELOW

The Court of Appeals affirmed the decision of the trial judge on the latter's opinion. The Court of Appeals' order and the District Judge's opinion are contained in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 27, 1977. A timely petition for rehearing was denied on June 15, 1977 (App. C). Jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether a petitioner under 28 U.S.C. §2255 is entitled to a hearing where he alleges without contradiction, and supports his allegations with the sworn testimony of witnesses, that the Government obtained his conviction with testimony which it knew at the time to be perjurious.

STATUTE INVOLVED

Section 2255, 28 U.S. Code, provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.****

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in the Southern District of New York, on June 22, 1965, of conspiring to import narcotics into the United States. He was sentenced to eighteen years in prison and fined \$20,000. His conviction was affirmed on appeal, *United States v. Armone*, 363 F. 2d 385 (2d Cir. 1966), and certiorari was denied, 385 U.S. 957 (1966). He began serving his sentence on May 19, 1965 (A. 3).*

The Government's entire case against petitioner was based upon the testimony of one Charles Hedges, previously convicted of importing narcotics, who claimed he made deliveries to petitioner, among others (R. 4.)**

On July 24, 1975, petitioner filed a motion to vacate his conviction and sentence, pursuant to 28 U.S.C. §2255. Relying entirely upon the testimony of Hedges and others in trials subsequent to his, petitioner claimed that the Government had suppressed evidence and knowingly used perjury in obtaining his conviction. Fourteen months later, District Judge Dudley Bonsal denied the petition without a hearing (App. A). Peti-

* On June 5, 1977 petitioner was released on parole. He remains on parole status until May, 1985.

** Reference is to petitioner's appendix in the Court of Appeals.

tioner appealed from the denial of a hearing. After argument, a panel of the Second Circuit affirmed on Judge Bonsal's opinion (App. B). This petition seeks reversal of that affirmation.

STATEMENT OF FACTS

Prior to petitioner's trial, Charles Hedges was tried in the District of Connecticut for conspiracy to import heroin. The Government's evidence in that case tended to show that Hedges had received shipments of narcotics from couriers in New York and that he had delivered them to one Joe Cahill. Hedges took the stand in his own defense and denied that he knew Cahill or the Government witness, one Aspelund, an alleged courier. Hedges swore that the first time he saw heroin was in the courtroom (R. 4). The jury convicted him, however, and the court sentenced him to fifteen years. On March 21, 1963, Hedges' conviction was affirmed on appeal. *United States v. Cianchetti*, 315 F. 2d 584 (2d Cir. 1963).

At petitioner's trial, on May 4, 1965, Hedges completely changed his testimony, swearing that he had helped import narcotics for Cahill, Aspelund, and others, including petitioner. His prior testimony, he said, was perjury (R. 4).

Petitioner's §2255 motion, relying entirely on transcripts of trials subsequent to his, alleged a pattern of known perjury and suppression of evidence. Many such items were complained of, but only two will be discussed here.*

* The other matters petitioner complained of were (1) perjury concerning the existence of tape recordings of Hedges (R. 4), (2) failure to turn over Jencks Act material (R. 5), (3) failure to disclose Hedges' role as informer-provocateur (R. 6), (4) failure to disclose the relationship of Hedges and agent Dugan (R. 6-7), (5) failure to disclose that Hedges didn't implicate petitioner until

1. Known perjury concerning consideration for Hedges' testimony

Hedges swore at petitioner's trial that he was "offered nothing, promised nothing . . . asked for nothing" (Tr. 1070) and "expected to get nothing" (Tr. 972) for his testimony. Petitioner alleged that this testimony was known by the Government to be perjurious (R. 7). Petitioner relied upon the following evidence, obtained after the trial, which supported the allegation:

(a) James Godwin, Hedges' cousin, testified in a 1969 trial, *United States v. Guante*, 64 CR 828 (SDNY), that when he and Hedges were in jail prior to petitioner's trial, Hedges said that Government agents "told him they would . . . get his sentence reduced from fifteen years to five years" (S.R. 37)*; that "they would get him out, they would give him money, they would give him a car, they would give him anything if he would testify in the case" (S.R. 39).

(b) Godwin's testimony in the aforementioned case that Hedges actually received \$3000 from the Government (R. 9, S.R. 37).

(c) Hedges' fifteen year sentence in *United States v. Cianchetti* was reduced by District Judge Timbers on May 15, 1963. According to a statement from Judge Timbers himself, recorded in *United States v. Kahn*, 65 CR 999 (SDNY), in 1966, this came about in part because agent Dugan, the narcotics agent

six months after he began cooperating (R. 9), (6) suppression of evidence of gun charges pending against Hedges at the time he testified (R. 10), and (7) perjury by Hedges concerning a robbery (R. 10).

* Reference is to petitioner's supplemental appendix below.

in charge of petitioner's prosecution, had secretly told Judge Timbers that the Government would not oppose a ten year sentence cut for Hedges (R. 6, S.R. 32-35).

(d) Agent Dugan testified in *United States v. Guante*, in 1969, that in 1962, while Hedges was appealing his conviction, Hedges lived in an apartment provided him by Dugan, who got him out on bail pending appeal. Dugan frequently visited Hedges there (R. 6).

(e) Hedges, Dugan, and another agent testified in *United States v. Kahn* that from September 1963 through 1964, Hedges was actively engaged as a government informer and provocateur, deceiving his attorney and helping to build a case against her and petitioner. Hedges worked closely in this endeavor with agent Dugan (R. 5-6).

In response, the Government did not dispute any of the facts in (a) - (e). Nor did it deny that agent Dugan was present throughout petitioner's trial and heard Hedges deny any promises or expectations of Government assistance. Nor did the Government deny that the evidence in (a) - (e) was unknown to petitioner at the time of his trial. Rather, the Government claimed that this previously undisclosed evidence of the Government's use of perjury was merely "impeaching," and would not have affected the outcome of the trial (R. 25).

The opinion of the District Judge, upon which the court below relied, *ignored* Godwin's testimony directly contradicting Hedges. Petitioner's claims on this issue, if mentioned at all, were disposed of by the irrelevant rhetoric that they were "either contradicted or not supported by the record" (App. A, p. 3).

2. Known perjury concerning Hedges' sentence reduction

Hedges swore at petitioner's trial that he had no conversation with anyone in the Government about a sentence reduction (Tr. 1070); it was just dropped in his lap: "I was offered nothing, promised nothing, and I asked nothing" (R. 6, S.R. 11). Hedges even denied knowing that the Government had not opposed his sentence reduction. He swore that he, on his own, told his attorney to apply for the reduction (S.R. 13b).

Petitioner's motion alleged that this testimony was perjurious and known to be such by agent Dugan, who was present when the testimony was given (R. 7).

Federal narcotics agent Dugan also swore at petitioner's trial that he had not advised Hedges to seek the sentence reduction (Tr. 3333). This, too, petitioner alleged, was perjurious (R. 7).

According to the statement of Judge Timbers, in *United States v. Kahn*, Judge Timbers, after being advised by Dugan that the Government would not oppose a sentence reduction for Hedges, told Dugan to tell Hedges or his attorney to file a motion for reduction (S.R. 34-35).

If Judge Timbers' account was correct, petitioner alleged, then both Dugan and Hedges lied at petitioner's trial. If Dugan did as he was told and advised Hedges to file the motion, then his contrary testimony was perjurious, as was Hedges'. The possibility that Dugan advised Hedges' attorney, but not Hedges, to file the motion was refuted by Hedges' own testimony. According to Hedges, he, not Dugan, told his attorney to file the motion (S.R. 13b).

The perjuriousness of Hedges' and Dugan's denials of any communication concerning the sentence reduction was estab-

lished not only by Judge Timbers' account, but by Godwin's sworn testimony that the Government promised Hedges a sentence reduction (1(a) *supra*), and by the close relationship between Hedges and Dugan during this period, when Dugan got Hedges out on bail (S.R. 40-41), Hedges was living in Dugan's apartment, and Hedges was working for Dugan as an informant-provocateur (R 6-7). That Dugan and Hedges never discussed the sentence reduction during this period is patently preposterous.

In denying a hearing on these allegations, the District Judge merely noted the totally irrelevant fact that Judge Timbers "initiated" the sentence reduction (App. A, p. 3).

REASONS FOR GRANTING THE WRIT

1. *The decision below flagrantly disregards the commands of §2255 and of this Court's decisions.*

Petitioner alleged in his §2255 motion the gravest of Due Process deprivations: the knowing use of perjured testimony by the Government, combined with perjurious testimony of the Government, *i.e.*, agent Dugan. This perjury had the plain purpose and effect of parading Hedges before the jury as a reformed citizen, testifying solely out of remorse for his own crimes and without hope of reward. In truth and in fact, Hedges — the sole witness against petitioner, who hadn't implicated petitioner until six months after he began cooperating (R. 9) — was promised and received a ten-year sentence reduction, release on bail, an apartment, at least \$3000 in cash, and other considerations for his testimony. Such use of known perjury has been condemned by this Court for more than forty years, *Mooney v. Holohan*, 294 U.S. 103 (1935); *Napue v. Illinois*,

360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972).

Section 2255, 28 U.S. Code, requires that where such constitutional violations are alleged, the court "shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto," unless the motion and the record "conclusively show that the prisoner is entitled to no relief." This Court has repeatedly held that §2255 means what it says. *Fontaine v. United States*, 411 U.S. 213 (1973); *Machibroda v. United States*, 368 U.S. 487 (1962); *Cf. Blackledge v. Allison*, U.S. 97 S.Ct. 1621 (1977).

There was nothing in the record or files of the case which established the allegations to be false, "palpably incredible," *Machibroda v. United States*, *supra*, at 495, or "patently frivolous," *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116, 119 (1955), and a hearing was therefore required. In fact, petitioner's allegations were strongly supported by the testimony of James Godwin which, if believed, in itself proved knowing use of and perjury by the Government; by the account of United States District Judge William Timbers,* and by the evidence, previously suppressed, of the assistance and money actually given to the witness by the Government (prior to, during, and after petitioner's trial). A stronger case for a hearing can barely be imagined.

Petitioner's motion, supported as it was by evidence outside the record, was the archetypal case for which §2255 was designed. If a court can dismiss such allegations without an evidentiary hearing, §2255 is vitiated, and a defendant convicted with known perjury is without remedy.

* Now a member of the United States Court of Appeals for the Second Circuit.

2. *The decision below affords a timely opportunity for this Court to extend Blackledge v. Allison to §2255 petitions raising questions of Constitutional deprivations in the course of trial.*

In *Blackledge v. Allison*, U.S. 97 S. Ct. 1621 (1977), the Court explicated the procedures a district judge should follow when confronted with a habeas corpus petition wherein the prisoner alleges that, contrary to his statements in a guilty plea proceeding, he had received unkept prosecutorial promises. The Court suggested that in such cases, a full evidentiary hearing is not *always* required. The summary judgment procedure of Fed Rule Civ. Proc. 56 (e), (f) can be invoked, requiring a petitioner, in some cases, to adduce extra-record evidence of his allegations (as petitioner did here, at the outset). This Court also suggested, without elaboration, the employment of magistrates, and pre-trial discovery proceedings, 97 S. Ct. at 1632.

It seems plain to petitioner that *Allison's* guidance applies to §2255 proceedings, and to those which challenge the Constitutionality of trial testimony as well as the voluntariness of a guilty plea. Yet neither the District Court nor the Circuit Court below considered any of the possibilities alluded to in *Allison*. Instead, those courts, like the district court in *Allison*, seemed to believe it is proper to deny a petition summarily whenever it challenges something in the record. If this were the law, of course, no factual issue would *ever* be raised by a habeas corpus or §2255 petition; an evidentiary hearing, the purpose of which is to determine whether the record is false or misleading, would virtually *never* be required.

Petitioner does not deny that habeas corpus and §2255 peti-

tions are a heavy burden on courts; that many, perhaps most, are frivolous. Lower courts need guidance in determining the permissible ways in which their time may be saved in sifting out the plausible petitions from the preposterous ones; and in expeditiously determining factual disputes. But summary denial in implicit reliance upon a conclusive presumption that Government witnesses and Government agents never commit perjury is not the answer.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted. Alternatively, petitioner suggests that the decision of the court below should be summarily vacated and remanded in light of *Blackledge v. Allison*, U.S., 97 S.Ct. 1621 (1977), which was decided after the decision below.

Respectfully submitted,

STEVEN B. DUKE
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Counsel for Petitioner

APPENDICES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT PACELLI,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

75 Civ. 3624 (PAC)
(64 Cr. 828)

Appendix A

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U.S. DISTRICT COURT
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S.D. OF N.Y.

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MEMORANDUM

BONSAL, D. J.

Petitioner, Vincent Pacelli, nearly eleven years after the jury trial on Indictment 64 Cr. 828, moves pursuant to 28 U.S.C. §2255 for an order vacating his conviction and sentence on the ground that his conviction was secured by the Government's use of perjury and suppression of impeachment evidence in violation of his constitutional rights. Petitioner also seeks bail pending determination of his Section 2255 motion.

Petitioner, along with eleven other defendants, was charged in Indictment 64 Cr. 828 with conspiracy to violate the federal narcotics laws, specifically, sections 173 and 174 of Title 21 of the United States Code. Following a seven-week jury trial, petitioner was convicted on June 22, 1965 and sentenced on July 29, 1965 to eighteen years imprisonment and a \$20,000 fine. The judgment of conviction was affirmed on appeal and certiorari was denied by the

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Supreme Court of the United States. United States v. Armone, 363 F.2d 385 (2d Cir.), cert. denied, Viscardi v. United States, 385 U.S. 957 (1966).

On November 8, 1965, Indictment 65 Cr. 999 was filed charging petitioner and two others with conspiracy to obstruct justice and suborn perjury in violation of 18 U.S.C. §371. Following a declared mistrial, a second trial was commenced before Judge McLean in February, 1966, and on March 9, 1966, petitioner was convicted by a jury of the crimes charged. Petitioner's conviction was affirmed on appeal, United States v. Kahn, 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966), and on March 30, 1966, petitioner was sentenced to two years imprisonment on both counts to run concurrently, but consecutive to the sentence imposed on him in the Armone trial.

In his moving papers, petitioner contends that: (1) certain materials, including tape recordings of certain conversations between the Government witness, Charles Hedges, and an attorney, Frances Kahn, were withheld from the defense in violation of 18 U.S.C. §3500 and Brady v. Maryland, 373 U.S. 83 (1963); (2) that the Government relied on Hedges' false testimony at the trial and the false testimony of Agent Thomas Dugan of the Federal Bureau of Narcotics and Dangerous Drugs regarding the taped conversations between Hedges and Kahn; and (3) that the Government suppressed evidence of Hedges' role as informer-provocateur and of his close relationship with Agent Dugan involving alleged offers by the Government to help Hedges obtain a reduction of his sentence in return for his

cooperation.

The Court was aware at the time of petitioner's trial that the Government was conducting an investigation with the assistance of Agent Dugan to determine whether or not petitioner was seeking to obstruct justice by sending Kahn to visit Hedges in the Westchester County Jail and to urge him not to testify at petitioner's trial and to repudiate his prior statements to the Government. While this investigation had no immediate relevance to the narcotics conspiracy for which petitioner was being tried at the time, petitioner's counsel was made aware of the investigation and given the opportunity to examine the materials, including tape recordings (transcript of U.S. v. Armone, 64 Cr. 828, at 923-26). Neither Pacelli's attorney nor any of the other defense attorneys chose to use any of this material as it would have obviously been seriously damaging to their clients' interest.

As to petitioner's contention that the Government suppressed evidence of its offer to help Hedges secure a reduction of his sentence, it is clear that Judge Timbars, who presided at Hedges' trial, initiated it following the affirmance of Hedges' conviction by the Court of Appeals. (Transcript of United States v. Kahn, 65 Cr. 999 at 1410-13).

In reviewing petitioner's other contentions concerning subornation of perjury by Agent Dugan and Hedges, the Court finds petitioner's allegations are either contradicted or not supported by the record. Furthermore, petitioner's contentions as to the suppression of evidence, even if taken as true, do not appear to meet the

standard of constitutional error as recently enunciated in United States v. Agurs, ___ U.S. ___, 44 U.S.L.W. 5013 (June 24, 1976).

Since petitioner's motion is without merit and is void of support in the trial record or in the affidavits submitted to the Court, the motion is denied without a hearing. 28 U.S.C. §2255; see, United States v. Romano, 516 F.2d 768, 771 (2d Cir. 1975); Williams v. United States, 481 F.2d 339, 345 (2d Cir.), cert. denied, 414 U.S. 1010 (1973).

It is so ordered.

Dated: New York, N.Y.
September 8, 1976

W. B. B.
U. S. D. J.

UNITED STATES COURT OF APPEALS APPENDIX B
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ^{April} ~~twenty-seventh~~ day of , one thousand nine hundred and seventy-seven.

P R E S E N T:

HON. THOMAS J. MESKILL, Circuit Judge

HON. CONSTANCE BAKER MOTLEY, District Judge*

HON. CHARLES L. BRIEANT, JR., District Judge*

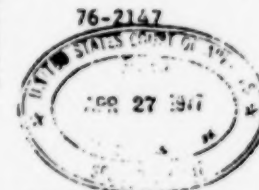
VINCENT PACELLI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.



Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Bonsal below.

Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

Constance Baker Motley, U.S.D.J.

Charles L. Briant Jr.
Charles L. Briant, Jr., U.S.D.J.

* Of the Southern District of New York, sitting by designation.

United States Court of Appeals

Appendix C

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit,
held at the United States Court House, in the City of New York, on the fifteenth
day of June , one thousand nine hundred and seventy-seven.

Present:

HON. THOMAS J. MESKILL,
Circuit Judge,

HON. CONSTANCE B. MOTLEY,

HON. CHARLES L. BRIENNT,

District Judges.
Circuit Judges.

Docket No. 76-2147

VINCENT PACELLI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

A petition for a rehearing having been filed herein
by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

No. 77-396

Supreme Court, U. S.

FILED

DEC 1 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

VINCENT PACELLI, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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VINCENT PACELLI, PETITIONER

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. B). The opinion of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1977. A petition for rehearing was denied on June 15, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on September 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion to vacate his sentence under 28 U.S.C. 2255 without an evidentiary hearing.

STATEMENT

On June 22, 1965, following a seven-week jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate the federal narcotics laws, 21 U.S.C. (1964 ed.) 173, 174. He was sentenced to 18 years' imprisonment and fined \$20,000. The judgment of conviction was affirmed. *United States v. Armone*, 363 F. 2d 385 (C.A. 2), certiorari denied, 385 U.S. 957.¹ Briefly, the evidence at trial showed that petitioner had conspired with others from 1956 through 1960 to import and distribute large quantities of heroin in the United States. The drugs were smuggled into this country from France with the aid of business and diplomatic couriers and eventually were sold to petitioner, who acted as a domestic wholesaler.

At trial, the government's chief witness was co-conspirator Charles Hedges. Hedges had previously been convicted of narcotics violations in a 1961 jury trial. In the course of that trial Hedges had testified in his own defense and, as he later admitted during his testimony in *Armone*, had committed perjury. Hedges was sentenced to 15 years' imprisonment. His conviction was affirmed on appeal, although those of his co-defendants were reversed. *United States v. Cianchetti*, 315 F. 2d 584 (C.A. 2). Shortly thereafter, at the suggestion of the district court, Hedges moved for a reduction of his sentence under Rule 35, Fed. R. Crim. P., and his sentence was reduced to five years' imprisonment.

¹Several co-defendants were fugitives at the time of the *Armone* trial. They were apprehended some five years later and were tried and convicted in 1969. The convictions were affirmed. *United States v. Guanti*, 421 F. 2d 792 (C.A. 2), certiorari denied, 400 U.S. 832.

In March 1966, petitioner was again convicted of federal criminal offenses in the Southern District of New York, this time of conspiracy to obstruct justice and suborn perjury, in violation of 18 U.S.C. 371, 1503, and 1622, and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to two years' imprisonment on both counts, the terms to run concurrently with each other but consecutively to the sentence imposed on him in the *Armone* case. Petitioner's conviction was affirmed. *United States v. Kahn*, 366 F. 2d 259 (C.A. 2), certiorari denied, 385 U.S. 948. The evidence at this trial established that petitioner and two co-defendants joined in an unsuccessful effort to prevent Hedges from testifying against petitioner at the *Armone* trial. Hedges was also a key witness against petitioner at the *Kahn* trial.

On July 24, 1975, petitioner moved pursuant to 28 U.S.C. 2255 to vacate his narcotics conspiracy sentence, alleging that the government had suppressed evidence and had knowingly used perjured testimony in obtaining his conviction. The district court denied the motion (Pet. App. A), and the court of appeals affirmed (Pet. App. B).

ARGUMENT

Petitioner contends that the district court erred in denying his motion to vacate sentence without holding an evidentiary hearing. Both courts below properly concluded, however, that "the files and records of the case conclusively show[ed] that [petitioner was] entitled to no relief" (28 U.S.C. 2255) and that a hearing was therefore not required. See *Fontaine v. United States*, 411 U.S. 213, 215; *Machibroda v. United States*, 368 U.S. 487, 494. This finding does not warrant further review.

1. Petitioner claims that Charles Hedges perjured himself at petitioner's trial when asked whether he was receiving any consideration from the government in

return for his testimony and that Hedges and Agent Thomas Dugan of the Bureau of Narcotics lied under questioning about the circumstances surrounding a reduction of Hedges' 15 year prison sentence in the *Cianchetti* case. In support of his contention that he was entitled to an evidentiary hearing on these claims, petitioner relies essentially upon the testimony of Hedges, Agent Dugan and others at various court proceedings held a decade ago. His claims are insubstantial.

Hedges testified at petitioner's narcotics trial that he "expected to get nothing" from the government for his testimony and was "offered nothing, promised nothing, and * * * [had] asked for nothing" (*Armone* Tr. 972, 1070). To demonstrate that these statements were false, petitioner points principally to the testimony of James Godwin, Hedges' cousin, given some five years later in the *Guanti* trial (64 CR 828 (S.D.N.Y.)). Godwin testified at that trial that Hedges had received \$3,000 from the government and that Hedges had said that government agents would have his *Cianchetti* sentence reduced from 15 to five years and would give him "anything" if he testified in the *Armone* trial (*Guanti* Tr. 917-920). Godwin did not identify any of the agents by name or personally hear any of the alleged promises about which Hedges purportedly had told him.

The district court properly concluded that Godwin's uncorroborated hearsay allegations in the *Guanti* trial were entitled to little weight. They had been presented in an effort to impeach Hedges, a key government witness, and thus to "ruin" the government's case (*Guanti* Tr. 485, 488). That they had little if any impact on the jury is clear from the fact that all defendants in *Guanti* were found guilty. Moreover, the court had an additional reason to view Godwin's allegations with circumspection inasmuch as petitioner had waited six years after Godwin's

testimony in the *Guanti* trial to seek relief on the grounds of alleged perjury by Hedges and Agent Dugan. See *Bishop v. United States*, 223 F. 2d 582, 586 (C.A. D.C.), vacated and remanded on other grounds, 350 U.S. 961.

Similarly unsubstantiated is petitioner's claim that Hedges and Agent Dugan lied about Hedges' sentence reduction. A review of the *Kahn* record makes clear that the reduction was a result of the district court's initiative, founded upon its concern that Hedges' sentence in *Cianchetti* was unfair in view of the reversal of his co-defendants' convictions (*Kahn* Tr. 1410-1413). The court mentioned the possibility of a sentence reduction to Agent Dugan, who responded that the government would have no objection. Hence, Agent Dugan's testimony in *Armone* that he did not tell Hedges to make an application for reduction of sentence (*Armone* Tr. 3333-3334), and Hedges' testimony that he did not recall discussing his sentence reduction with Agent Dugan (*Armone* Tr. 1070), are not inconsistent with the sentencing judge's recollection that he "asked Mr. Dugan to communicate with Hedges' attorney * * * or with Hedges himself" (*Kahn* Tr. 1413). Finally, there is no inconsistency between Hedges' trial testimony in *Armone* and his relationship with Agent Dugan as an informant.

2. In the face of moving papers that contained no more than hearsay, conclusory allegations, and speculation, the district court correctly concluded that an evidentiary hearing was not required. *Blackledge v. Allison*, 431 U.S. 63, 75; *United States v. Romano*, 516 F. 2d 768, 771 (C.A. 2).² Petitioner's assertions were insufficient to state a valid

²*Fontaine v. United States*, 411 U.S. 213, *Machibroda v. United States*, 368 U.S. 487, and *Blackledge v. Allison*, *supra*, upon which petitioner relies (Pet. 9), each involved detailed factual allegations, not rebutted by the record, that a guilty plea had been unconstitutionally induced—allegations that could only be resolved

claim under Section 2255 because there was no credible proof that Hedges' testimony was false or, if false, was known to be so by the government. Furthermore, even if Hedges did in fact lie about the matters now raised by petitioner, "there is [no] reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103. See also *United States v. Stofsky*, 527 F. 2d 237, 246-247 (C.A. 2), certiorari denied, 429 U.S. 819. Petitioner does not claim that any of the allegedly false testimony related to details of his involvement in the narcotics conspiracy of which he was found guilty. Rather, all of petitioner's allegations concern answers given to questions designed solely to impeach Hedges' credibility. But during a cross-examination in *Armone* that covered more than five days, Hedges testified about having committed perjury at his own trial, his extensive criminal background, and his cooperation with the government. Evidence serving to undermine his credibility even further would have been of minimal value to the defense. See *United States v. Rosner*, 516 F. 2d 269, 278-279 (C.A. 2), certiorari denied, 427 U.S. 911.³

after an evidentiary hearing and that, if correct, would unquestionably have entitled the defendant to relief under Section 2255. By contrast, an evidentiary hearing was unnecessary here because the record contained an adequate basis for the district court to determine whether petitioner's allegations were accurate and, if so, whether they would warrant collateral relief from his conviction.

³There is nothing to petitioner's contention (Pet. 10-11) that the suggestion in *Blackledge v. Allison*, *supra*, 431 U.S. at 80-82, of a less than full evidentiary hearing should have been implemented in this case. Petitioner was afforded ample opportunity by the district court to present affidavits and other materials to "test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence." *Blackledge v. Allison*, *supra*, 431 U.S. at 80.

In sum, the district judge below, who also presided over petitioner's *Armone* trial, enjoyed the best possible position to assess the likely impact on petitioner's trial of the claimed perjury, since he "had the advantage of intimate familiarity with the case, born of many pre- and post-trial motions and a long trial where he had the opportunity to observe the witnesses." *United States v. Franzese*, 525 F. 2d 27, 32 (C.A. 2) (footnote omitted), certiorari denied *sub nom. Potere v. United States*, 424 U.S. 921. In these circumstances, the district court did not abuse its discretion in determining that petitioner's motion to vacate sentence—filed ten years after trial and long after all the evidence relied on by petitioner was a matter of public record—could be disposed of without the necessity of an evidentiary hearing.

CONCLUSION

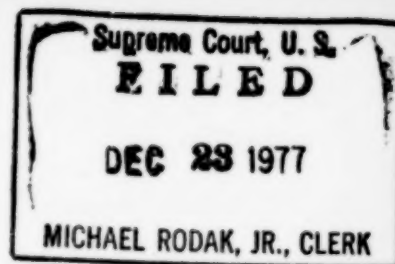
The petition for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 1977.



In the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-396

VINCENT PACELLI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITIONER'S REPLY BRIEF

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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

VINCENT PACELLI,
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PETITIONER'S REPLY BRIEF

1. The Government seeks to avoid the fact that Godwin's testimony squarely contradicts that of the Government's witness Hedges by characterizing it as "uncorroborated hearsay" (G.B. 4). Even if it were such, a hearing would plainly be required, but it is neither. Godwin's testimony that Hedges told him he had been promised a sentence reduction, money and "anything" if he would testify was given under oath, in a United States District Court. It was subjected to cross-examination by the Government. It was, therefore, not hearsay. 5 Wigmore, Evidence §1370*. Indeed, since petitioner was denied a

* Rule 801, Federal Rules of evidence, classifies such prior testimony as hearsay but admits it under the "former testimony" exception. Rule 804.

hearing in support of his petition, wherein he could have presented Godwin's testimony to the District Judge below, the Godwin evidence was virtually the best evidence which could possibly be produced in support of the §2255 petition.

To call such evidence "uncorroborated" is equally erroneous and ignores the record. The evidence was corroborated by the uncontested facts that Hedges actually received (1) the ten-year sentence reduction which he told Godwin he had been promised, (2) \$3,000 cash, (3) an apartment, (4) a reduction of bail, (5) help with State authorities on a gun charge, and other considerations. Petitioner could hardly have made a stronger case that Hedges lied to petitioner's jury when he swore he was promised and expected nothing.

The Government's claim that Godwin's testimony should be rejected without hearing it because another jury convicted other defendants when it was offered in the *Guanti* case (G.B. 4) is absurd. The record below does not suggest what the evidence against the defendants in *Guanti* was, nor whether Hedges again lied as he did in petitioner's trial. It is impossible to infer that the *Guanti* jury disbelieved Godwin. Moreover, that is not the issue. The judge below never heard Godwin. Neither did petitioner's jury. Hedges was the only witness against petitioner, and he manifestly perjured himself. In any event, petitioner is entitled to an opportunity to prove that in the District Court. It is also worth noting that nowhere in the Government's lengthy affidavits submitted in opposition to petitioner's motion in the District Court is there any statement, hearsay or otherwise, from Dugan, Hedges or anyone else denying the truth of Godwin's testimony in *Guanti* or the perjuriousness of Hedges' testimony in petitioner's trial.

2. Against petitioner's claim that both Hedges and the Government agent Dugan lied about not discussing the sentence reduction, the Government relies on the same irrelevance as did the district judge, *i.e.*, the fact that Judge Timbers initiated discussions with the Government about the reduction (G.B. 5). The inescapable facts are, however, that the reduction occurred only because agent Dugan, (1) told Judge Timbers the Government would not oppose it and, (2) told Hedges to have his attorney file the motion; (3) the Government did not oppose the motion. Hedges' denial of any knowledge or discussion of these facts was, as pointed out in the petition (p. 8), utterly preposterous in view of the newly discovered evidence of the close relationship between Hedges and Dugan and Godwin's testimony about the promised sentence reduction.

3. The Government complains that Godwin's testimony is six years old (G.B. 4-5). Yet there is no suggestion that any of the participants in the perjury are presently unavailable to testify or that the Government is in any sense prejudiced by the delay. The real significance of the lapse of time is that petitioner suffered twelve years imprisonment on a patently unconstitutional conviction.

Respectfully submitted,

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